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CASES AND MATERIALS ON FAMILY LAW

Volume 1

EDITED BY

BERNARD GREEN

1985-86

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CHAPTER ONE: INTRODUCTION

I. The Constitutional Framework: Division of Powers and Charter of Rights

The Constitution Act allocates exclusive legislative power over some aspects of family law to the provinces and over others to the federal government. It is questionable whether the allocation is rational.

The provinces have exclusive legislative power in relation to

- solemnization of marriage [s.92(12)]
- property and civil rights [s.92(13)]
- charities [s.92(7)]
- the administration of justice within the province [s.92(14)]
- the appointment of judges of inferior courts [s.92(14); 96]

The national government has exclusive legislative power in relation to

- marriage and divorce [s.91(26)]
- criminal law [s.91(27)]
- the appointment of judges of the superior courts [s.96]

We have referred to the provinces' exclusive legislative power in relation to the appointment of judges of inferior courts and the central government's exclusive legislative power in relation to the appointment of judges of superior courts. The Supreme Court of Canada recently had to consider whether the action of British Columbia in vesting adoption and other jurisdiction in its provincial court judges was ultra vires. See Re Family Relations Act of B.C. (1982) 40 N.R. 206.

Several cases decided by the highest courts have turned on the constitutional issue, e.g. Kerr, referred to in Chapter Two. The division of powers between the federal and provincial governments has forced legislative draftsmen into some awkward corners. For example, section 20 of Ontario's Family Law Reform Act requires the suspension of any application for support or custody under that Act, if an action for divorce is commenced under the federal Divorce Act. While satisfying constitutional dictates, this provision has caused confusion and has resulted in tactical maneuvering by counsel. (See also the Family Relations Act (B.C., ss. 5-8). For a recent discussion, see Colvin, Family Maintenance: The Interaction of Federal and Provincial Law (1979), 2 Can. J. Fam. L. 22]



CHAPTER TWO: FORMATION OF THE FAMILY UNIT AND ANNULMENT



"Let's buy the American dream together."

• •

I. Introduction

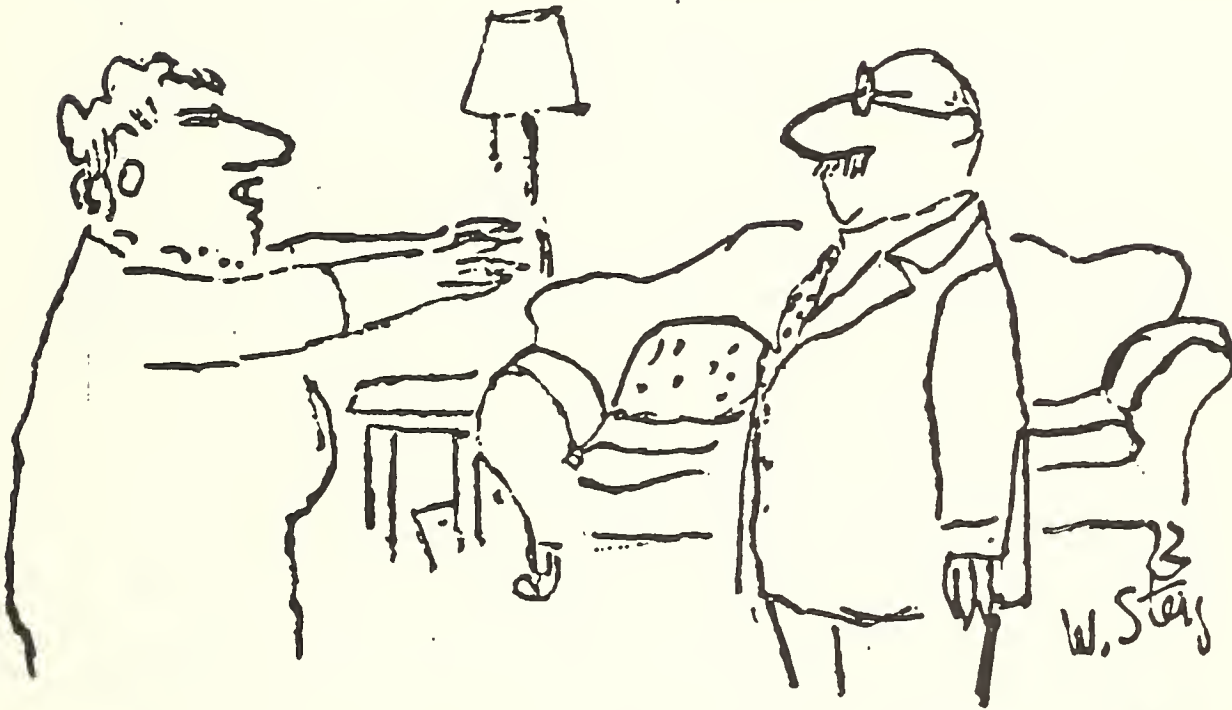
The material in this chapter deals with the following problems:

- (a) which jurisdiction - the provinces or the federal government - has the power to formulate the conditions that must be met before a marriage may be celebrated?
- (b) what conditions must be satisfied before a legally valid marriage is created and what is the effect of a failure to meet these conditions?

CHAPTER FOUR: ECONOMIC RELATIONS BETWEEN "SPOUSES"

I. Introduction

NEW YORKER 19 April/64 p42



"When you wake up, you will be generous. Very, very generous."

In this chapter we examine the two basic aspects of the economic relations between husband and wife, and peripherally, between unmarried cohabiting couples. These aspects are:

- (1) property rights
- (2) maintenance (support) obligations

The law in this area has undergone very significant changes in the last few years. The major change has been legislative as exemplified by the Family Law Reform Act which came into force in 1978. The F.L.R.A. changed the law relating to maintenance (support) as well as to property.

Other changes have been made by the courts. The most important of these has been the development of the constructive trust concept by the Supreme Court of Canada. See Pettkus v Becker and Leatherdale reproduced infra.

As a result of these changes unmarried cohabitants now have some (but not all) of the rights and obligations of married persons; women who are not in the labor market are now accorded more property rights. The question to be determined is whether more change is still needed.

To answer that question requires that you examine two basic assumptions of our present legal system: that marriage (or now, in certain cases, cohabitation) imposes economic obligations on the parties to it and that the state provides help to society's losers, but only as a last resort.

In your reading of the following material consider your present and future family situations and those of your clients and then attempt an assessment of our system in light of this formulation of the problem:

"The main problem which every system...has to solve is the reconciliation of the needs of the household as an economic unit with the ideas of individual ownership on the one hand, and with the claims of the spouses' kinship groups on the other."

Kahn-Freund, "Matrimonial Property Law in England," in Matrimonial Property Law (Friedmann, ed.), 287.

Is it possible to achieve justice in this field regardless of the system in force in a particular jurisdiction? Consider this case: H and W were married in 1958; their son was born in 1960; their marriage ended in 1968. H was a musician and part-time teacher; his annual income was between \$1,000 - \$3,000; W was a lawyer earning \$25,000 at the end of the marriage and was a 40% partner in her firm.

At the time of marriage the parties moved into a home owned by W. This home was sold by W and the proceeds (\$25,000) deposited into her account. W owned other real estate property before marriage and acquired still other parcels afterwards worth over \$100,000.

What share, if any, should H obtain? Why? Cf. Mix (1975) 536 P 2d 479 (Calif. S.Ct.) Should H be able to obtain support from W? Why? If yes, what amount would you award?

Should the parties be able to provide by agreement for results different from those that you have considered just?